



February 7, 2000

Ms. Katherine Minter Cary
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2000-0452

Dear Ms. Cary:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 131409.

The Office of the Attorney General (the "OAG") received a request for information concerning Baylor Health Care System ("BHCS") and Texas Health Resources ("THR"). The OAG Consumer Protection Division ("CPD") has submitted to this office documentation which is responsive to the request. CPD claims that the requested information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. CPD asserts that some of the requested information should be withheld from disclosure under section 552.110 because it contains commercial or financial information, the disclosure of which would cause substantial competitive harm to BHCS and THR. We have considered the exceptions CPD claims and reviewed the submitted information.

CPD states that it has released duplicate copies of all correspondence produced in response to the previous request from the same requestor which resulted in Open Records Letter No. 99-1858 (1999). However, none of the documentation previously determined to be excepted from disclosure has been released. Further, CPD claims that all subsequent correspondence responsive to the current request has either been provided to the requestor by CPD or withheld pending the determinations of this office.

CPD argues that some of the responsive information is confidential under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, including section 15.10(i) of the Business and

Commerce Code. CPD states that some of the requested information was produced by BHCS and THR in response to Civil Investigative Demands (“CIDs”) issued under section 15.10(i) of the Business and Commerce Code, which provides in part:

(1) Except as provided in this section or ordered by a court for good cause shown, no documentary material, answers to interrogatories or transcripts of oral testimony, or copies or contents thereof, shall be available for examination or used by any person without the consent of the person who produced the material, answers, or testimony and, in the case of any product of discovery, of the person from whom the discovery was obtained.

Bus. & Com. Code § 15.10(i).¹ CPD argues that because there has been no court order providing for production of any CID material produced by BHCS or THR and neither party has consented to release of such material, it is excepted from disclosure. Therefore, we conclude that, under section 552.101 in conjunction with section 15.10(i) of the Business and Commerce Code, CPD must withhold documents and information submitted to CPD in response to CIDs, interrogatories and requests for documents and information *directly derived* from such responses. However, we note that the CIDs, interrogatories and requests for documents themselves are not confidential under section 15.10(i) and must be released. *See State v. Lowry*, 802 S.W. 2d 669 (Tex. 1991).

Since the property and privacy rights of third parties may be implicated by the release of the requested information, CPD notified BHCS and THR, whose information is responsive to the request. *See Gov’t Code* § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Counsel for both BHCS and THR submitted their respective responses to this office in which they consent to the release of numerous documents and argue against disclosure of the remaining documentation under sections 552.101, 552.103, and 552.110.

BHCS and THR argue that some of the documentation submitted for this ruling should be withheld under the predecessor to the current section 552.103. Section 552.103 is a “permissive exception” which grants to a governmental body the discretion to either release or withhold information. *See Open Records Decision No. 522 at 4* (1989). Because the permissive exceptions to disclosure do not make information “confidential,” a governmental body may decide not to raise a permissive exception and may release to the public this

¹ The exceptions permit the attorney general to make information available for use in investigations, judicial proceedings, and criminal law enforcement. The exceptions to confidentiality in section 15.10(i) do not apply here.

nonconfidential information. Therefore, as CPD did not raise section 552.103 for any of the requested information we will not address BHCS' and THR's arguments under section 552.103.

BHCS and THR argue that much of the information at issue is trade secret or commercial or financial information that is protected from disclosure under section 552.110. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . .* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management. [Emphasis added.]

Restatement of Torts § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" prong of section 552.110 to requested information, we accept a private person's claim for exception as valid under that prong if that person establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990).²

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

Section 552.110(b) excepts from required public disclosure “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *See generally National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information.

BHCS and THR seek to protect from disclosure the same commercial or financial information. Although THR has made only unsubstantiated, conclusory statements regarding the confidentiality of the information, BHCS has provided specific factual evidence that disclosure of portions of the information would cause substantial competitive harm under the commercial or financial information prong of section 552.110(b). Therefore, we conclude that portions of the information at issue are protected from disclosure under section 552.110. We have marked the documents accordingly.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

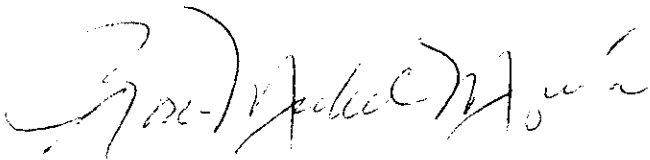
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Rose-Michel Munguía". The signature is fluid and cursive, with the first name "Rose" and last name "Munguía" being the most prominent parts.

Rose-Michel Munguía
Assistant Attorney General
Open Records Division

RMM/jc

Ref: ID# 131409

Encl. Submitted documents

cc: Mr. Charles Ornstein
Dallas Morning News
P.O. Box 655237
Dallas, Texas 75265
(w/o enclosures)